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SUPREME COURT, U.S.

NO. 81-6947

SUPREME COURT OF THE UNITED STATES OF AMERICA

1981~~1982~~ TERM

THE PEOPLE OF THE STATE OF COLORADO,

~~Plaintiff~~-Appellee,

vs.

RICHARD VELASQUEZ,

~~Defendant~~-Appellant.

APPEAL FROM THE SUPREME COURT OF COLORADO NO. 80SA517

JURISDICTIONAL STATEMENT

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IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA

NO.

SUPREME COURT OF COLORADO NO. 80SA517
COURT OF APPEALS OF COLORADO NO. 80CA0021
DISTRICT COURT, MONTROSE COUNTY, STATE OF COLORADO NO. 79CR11

JURISDICTIONAL STATEMENT

THE PEOPLE OF THE STATE OF COLORADO,

Plaintiff-Appellee,

vs.

RICHARD VELASQUEZ,

Defendant-Appellant.

Richard Velasquez, Defendant-Appellant, will herein after be referred to as Appellant and The People of the State of Colorado, Plaintiff-Appellee, will herein after be referred to as Appellee. Appellant is making this Jurisdictional Statement according to Rule 15 as amended effective November 21, 1980 of the Supreme Court Rules of The Supreme Court of the United States of America.

QUESTIONS PRESENTED BY THE APPEAL

ARGUMENT I

Do the due process and equal protection clauses of the Fifth and Fourteenth Amendments of the United States Constitution and Article II §§3, 6, and 25 of the Colorado Constitution protect the Appellant against his counsel's failure to appeal points of error previously raised, his counsel's failure to properly raise all issues possible, and his counsel's failure to properly investigate all aspects of the case, failure to prepare a defense and failure to request a continuance of trial in order to have ample time in which to effectively represent the Appellant, despite the Appellant's objections throughout the proceedings that his counsel do all of the above, and thus allow the Appellant to raise all possible errors on his own since the "deliberate by-pass" of these errors was not the choice of the Appellant but of his attorney's against the wishes of the Appellant?

ARGUMENT II

Argument II presents several questions. They are as follows:

1. Does the Fourth and Fourteenth Amendments of the United States Constitution and Article II §§6, 7, and 25 of the Colorado Constitution protect the

Appellant from unreasonable searches and seizures, and require all searches and seizures to be supported by probable cause and meet all the warrant or warrantless search and seizure requirements, and protect the Appellant from the use of all evidence obtained from an unreasonable search and seizure from being used as evidence against him at trial?

2. Was the seizure and later search of Appellant's car incident to arrest and supported by probable cause?

(a). Does the arrest, search and seizure of Appellant inside the motel room provide justification to seize Appellant's car, which was parked outside, as incident to arrest?

(b). Does the arrest in the motel room and seizure of the evidence therein povide probable cause to seize and search Appellant's car and were there exigent circumstances requiring immediate seizure without a warrant?

(c). Was there any justification to seize or remove Appellant's car from the motel parking lot?

(d). Does the fact that the evidence searched for in the car was evidence of a different crime than what Appellant was arrested for and which could not properly be used to support the crime for which Appellant was arrested provide probable cause to seize and search Appellant's car without a warrant and as incident to arrest?

(e). Does the fact that Appellant had been arrested and handcuffed inside the motel room and taken from there to jail and incarcerated and his car had been towed, impounded and sealed by the police and later searched pursuant to a search warrant provide further proof that the seizure and search of the car was not incident to arrest and thus must depend entirely on the sufficiency of the affidavit and search warrant?

2a. Does the search warrant and affidavit provide probable cause to search and is it sufficient or is it fatally defective?

(a). Does the warrant and affidavit contain written affirmation, underlying facts or circumstances on which the affiant based his conclusions that a further quantity of dangerous drugs and/or traces of marijuana were located in Appellant's car or was this just a general exploratory search? Does the warrant and affidavit contain written affirmation, underlying facts or circumstances on which the informant or anyone else based his conclusions that a further quantity of dangerous drugs and/or traces of marijuana were located in Appellant's car?

(b). Was the search of the suitcases and othe containers in the car illegal because it was done without a warrant and without probable cause?

(c). Did the use of the word "may" rather than a more positive word such as "is" or "are" by the affiant in the phrase "a further quantity of dangerous drugs and/or traces of marijuana may be located in the above described car" make the search warrant and affidavit vague and fatally defective and prove that the search was exploratory and conducted without probable cause?

(d). Does the search warrant and affidavit fail to partivularly describe the place to be searched or the things to be searched for and seized by the use of the words and phrases "dangerous drugs", "marijuana" and "traces of marijuana" in the search warrant and affidavit and thus making these documents vague and fatally defective and provide further proof that the search was exploratory and conducted without probable cause?

(e). Was the warrant and affidavit fatally defective because the blank was not filled in which states who the affiant appeared before and who is authorized to issue warrants in criminal cases? Did it also fail to state where the car is located? Did it also fail to state which Judge of what court signed the warrant?

(f). Was the alleged search for traces of marijuana illegal as not being based on probable cause and because it was a search for something that is not a crime?

ARGUMENT III

1. Does the Sixth and Fourteenth Amendments of the United States Constitution and Article II ~~Sec~~, 16 and 25 of the Colorado Constitution protect Appellant from ineffective assistance of counsel and guarantee that he be represented by effective assistance of counsel at all stages of the proceedings and did Appellant's counsel provide such assistance to him in this case?

This Argument also presents several other questions. They are as follows:

(a). Did Appellant's attorney's closing argument violate Appellant's right to effective assistance of counsel? Did Appellant's Attorney's stating that Appellant was guilty, of bad character, and other derogatory remarks, during this closing argument in effect enter a plea for Appellant, something that is only proper for Appellant to do?

(b). Was Appellant deprived of effective assistance of counsel by the court returning a sum of confiscated money and dismissing the public

defender and ruling that Appellant was no longer indigent and could now afford to hire his own attorney?

(c). Did Appellant's attorney have sufficient time to investigate all possible errors and to also properly prepare for trial and was it error for him not to request a continuance? Was it also error for Appellant's attorney not to perfect an appeal of all errors that he had previously raised?

(d). Does the record show that there were many other errors which could have been raised and would have by any competant and experienced attorney and which further demonstrate Appellant's attorney's incompetance in this matter?

(e).. Should the following errors have been raised and appealed by Appellant's attorney?

(1). Was it error for Appellant's attorney to fail to analyze and introduce the inaudible tape recording into evidence?

(2). Was it error for Appellant's attorney to fail to adequately argue and investigate the circumstances surrounding the identification of the substance charged in Count V? Was Appellant convicted of a higher class of crime than what was shown by the evidence?

(3). Was Appellant convicted on Counts I and II in violation of the Constitutional proscriptions against double jeopardy?

(4). Were the Jury instructions adequate and did they properly instruct the jury of all the elements of the crimes charged?

ARGUMENT IV

Does the Fourteenth Amendment of the United States Constitution and Article II §§6 and 25 of the Colorado Constitution protect Appellant from being sentenced under laws which have been amended and now afford lower penalties and thus provide that he be sentenced pursuant to any amendatory legislation which mitigates the penalty for crimes when the relief is sought before finality has attached to the judgment of conviction?

ARGUMENT V

This argument also presents several questions. They are as follows:

1. Was Appellant denied his Constitutional and Statutory right to a speedy trial and does the Sixth and Fourteenth Amendments of the United States Constitution and Article II §§6, 16, and 25 protect these rights?

(a). Is the requirement that a plea be entered before the speedy trial time period begins unconstitutional because it establishes a lower

standard than is required by the Federal Constitution rather than a higher standard? Does it also create a standard whereby the Courts can intentionally by-pass an individuals speedy trial rights and does it also violate an individuals equal protection rights?

(b). Was Appellant properly advised by the court and the public defendar of his speedy trial rights?

(c). Was Appellant's Statutory right to a speedy trial violated by the fact that the trial court granted a single continuance which exceeded six months?

(d). Was the fact that the public defender had a vacation planned justification to violate the speedy trial time period or should the public defender have been ordered to appear on the date available or new counsel should have been appointed?

(e). Is it required that Appellant demand a speedy trial before he is entitled to the benefits of a speedy trial?

(f). Did Appellant request any continuances of trial and were any in fact given?

(g). Do the Colorado statutes provide that the court enter a plea of not guilty should a defendant fail to plead and thus a plea is actually entered at arraignment whether a defendant pleads or not? Is it proper for the court to set a trial date before a plea is entered?

ARGUMENT VI

Does the Fourth and Fourteenth Amendments of the United States Constitution and Article II §§6, 7, and 25 of the Colorado Constitution protect Appellant frome warrantless investigations and arrests by officers not in their own jurisdiction?

(a). Does the Montrose City Police have jurisdiction to conduct investigations and effect arrests therefrom outside the city limits without a warrant?

(b). Did the Colorado Bureau of Investigations (CBI) conduct this investigation in conjunction with the Montrose Police Department or did they only participate in an advisory capacity only? Was their presence also the fruit of the illegal investigation conducted by the Montrose Police Department?

(c). Can a Montrose Police Officer be specially deputized as a county sheriff? Can an Officer be a City Police Officer and a Sheriff at the same time? Do the Colorado Statutes or the Montrose City Ordinances provide for

such a procedure?

ARGUMENT VII

Does the Fourth and Fourteenth Amendments of the United States Constitution and Article II §§6, 7, and 25 of the Colorado Constitution protect Appellant from warrantless participant electronic monitoring and recording, by the state, of conversations betweent him and a police informant where the informant consented to the monitoring and recording?

(a). Is a warrant required before a listening device can be placed inside a room and prior to authorizing police agents to listen and record the conversation from outside?

(b). Was the monitoring and recording illegal and unreasonable because the bug was placed in a location, in the room behind the headboard of the bed, rather than on the person of the informant?

((c). Was it error to allow the agents listening to the conversation from outside the motel to testify and not introduce the tape recording itself?

ARGUMENT VIII

Did the court make a proper ruling concerning all issues as to their violation of both Federal and State Constitutions?

ARGUMENT IX

Did the court err in not granting Appellant a Rehearing due to the fact that Appellant was not notified when the hearing was to be and thus was not given the opportunity to present a supplemental or reply brief prior to the hearing and thus was deprived of a hearing pertaining to all the additional research that he had done between the time that he filed his Opining Brief and the time of the hearing? Did the court also misinterpret some of the issues and also rule contrary to some of the arguments than what was presented in the briefs and record?

ARGUMENT X

Did the Court err in not granting Appellant a limited remand to the trial court in order to present many of the new issues that Appellant had discovered in his research and that had not been raised below and that all state remedies had not been exhausted on?

PARTIES TO THE PROCEEDING

Hon. Jerry D. Lincoln, Judge, Montrose District Court, Montrose County, State of Colorado; Montrose District Court, Montrose County, State of Colorado;

William Morris, Assistant Attorney General, State of Colorado; Supreme Court of the State of Colorado; Supreme Court of the United States of America; Richard Velasquez, Pro Se, Montrose, Colorado, Defendant-Appellant.

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REFERENCES OF THE REPORTS

(d). The references of the reports of this case appear as follows: People v. Velasquez, No. 80SA517, February 16, 1982, The Colorado Lawyer, Vol. 11 No. 4, April 1982 p. 1081; People v. Velasquez, Colo., 641 P.2d 943 (1982).

NATURE OF PROCEEDINGS

(e). References to folio notes in the transcript will be in parenthesis (fn.).

This is an appeal from a jury's verdict of guilty and judgment and sentence entered thereon for four counts of a six count Information. Appellant was arrested on December 22, 1978 and incarcerated. A complaint was then filed against Appellant on January 3, 1979, (fn. 1-5). After a preliminary hearing the matter was bound over to the district court. The Information was supplemented by the addition of additional counts on February 8, 1979, (fn. 6-10). The counts charged were: Count I: dispensing dangerous drugs (F) in violation of 12-22-404 (1) (a), C.R.S. 1973, as amended in 1978,(fn. 394); Count II: Possession more than one ounce cannabis (M) in violation of 12-22-404 (1) (L), C.R.S. 1973, as amended 1978, (fn. 297); Count III: Possession of an illegal weapon in violation of 18-12-102, C.R.S. 1973, as amended 1978, (fn. 401); Count VI: Carry concealed firearm (M-2) in violation of 18-12-105 (1) (b), C.R.S. 1973, as amended 1978, (fn. 403); Count V: Possession of a narcotic Drug (F) in violation of 12-22-302, C.R.S. 1973, as amended 1978, (fn. 405); Possession of a narcotic drug for sale (F) in violation of 12-22-322 (1) (a), as amended 1978, (fn. 411). Appellant initially appeared in the district court with a public defender on March 8, 1979 for arraignment. Trial was then set for September 17, 1979. The public defender was dismissed from Appellant's case several days after arranignment and he subsequently obtained private counsel who entered his appearance on July 23, 1979. A hearing was held on the motion to suppress on August 27, 1979 and trial commenced on September 17, 1979 after a pretrial motion to dismiss, (fn. 546-778, 802-833). At the close of the prosecution's case, ajudgment of acquittal was entered as to count six but denied as to the remaining counts of the Information, (fn. 1591-95). On September 18, 1979, Appellant was found guilty of counts I, II, IV, and V of the Information and not guilty of count III, (fn. 1657-62). All post-trial motions were denied, (fn. 108-113, 115-119, 195, 197). Appellant was then sentenced on October 10, 1979 to a minimum of six (6) years and maximum of ten (10) years at the Colorado State Penitentiary on Counts I and V and to one year (1) in Montrose County Jail on Counts II and IV. All sentences to run concurrently, (fn. 1785).

The appeal duly proceeded from there. Appellant and his attorney had several disagreements during the trial proceedings mentioned above but the biggest disagreement concerned his handling of the appeal. Appellant's attorney only appealed one point of error rather than several as had been discussed previously. An Opening Brief was filed on behalf of Defendant-Appellant on May 19, 1980 in the Colorado Court of Appeals containing only one point of error. Appellant filed several motions with the courts and wrote letters to the Judge concerning this but received no response. Appellant does not have copies of many of these motions and letters as he was unfamiliar with court procedures at that time and thus did not make copies but they should appear in the record someplace. Appellant did request discovery of the entire record at one time so that he would have a chance to review everything but this motion was denied, one of these motion was denied March 12, 1981. Appellant's case was transferred from the Court of Appeals of Colorado to the Colorado Supreme Court without his knowledge and was informed of this in a letter from his attorney dated December 27, 1980 stating that his hearing was scheduled for January 16, 1981 at 1:30 p.m. Thereafter the Supreme Court of Colorado granted Appellant leave to proceed Pro Se on January 15, 1981 and granted him sixty (60) days or until March 16, 1981 within which to file a handwritten brief in support of appeal points. Appellant was then granted leave to Proceed in Forma Pauperis on February 11, 1981. Appellant was then given an additional extension in which to file an Opening brief and finally filed one on May 12, 1981. The prosecution filed the Answer Brief on September 8, 1981.

Appellant was never informed of the date of the hearing. Appellant had much research which he wished to present to the Court prior to the hearing but was not able to since he was not given notice of when the hearing was to be. The hearing was held February 15, 1982 and announced February 16, 1982. Due to the fact that Appellant learned of the decision from the newspaper he sent a letter to the Court requesting a copy of the opinion and an extention of time in which to file for a Rehearing. The extention was granted until March 24, 1982. Appellant had filed a motion for rehearing with the court with the court within the original time period since he had not heard from the court as yet and thus the Motion For Rehearing was denied March 15, 1982. Appellant then filed a more conplete Motion For Rehearing after this because he thought he had been given an extension and this motion was Stricken. The mandate was then

issued March 19, 1982. Appellant has since sent a Notice of Appeal Dated June 7, 1982 pursuant to Rule 12 of the Supreme Court of the United States Rules. Appellant does not know what day it reached the court as he filed it rather late in the time period due to his confusion of the rules. The Notice of Appeal was mailed to the District Court, Montrose, Colorado; Supreme Court of Colorado; and the Supreme Court of the United States of America.

The statutory provision Appellant is relying to confer jurisdiction of the appeal on this Court is 28 USCA §1257 and the Supreme Court of the United States of America Rules 10-15 and 53-now 46. Appellant is relying on the rules Amended effective November 21, 1980 as they appear in the 1981 Supplement issued in August in Volume 17 of the Supreme Court Digest "Lawyers Edition". The institution where Appellant is incarcerated has not updated their library.

(f). The constitutional provisions, treaties, statutes, ordinances, and regulations that this case involves are:

CONSTITUTION OF THE UNITED STATES

ARTICLE IV

Searches and seizures regulated. The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

ARTICLE V

Grand jury-indictment-jeopardy-process of law-taking property for public use. No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

ARTICLE VI

Rights of accused. In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause

of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense.

ARTICLE XIV

1. Citizenship defined-privileges of citizens. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

COLORADO CONSTITUTION

ARTICLE II

Section 3. Inalienable rights. All persons have certain natural, essential and inalienable rights, among which may be reckoned the right of enjoying and defending their lives and liberties; of acquiring, possessing and protecting property; and of seeking and obtaining their safety and happiness.

Section 6. Equality of justice. Courts of justice shall be open to every person, and a speedy remedy afforded for every injury to person, property or character; and right and justice should be administered without sale, denial or delay.

Section 7. Security of person and property-searches-seizures-warrants. The people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures; and no warrant to search any place or seize any person or things shall issue without describing the place to be searched, or the person or thing to be seized, as near as may be, nor without probable cause, supported by oath or affirmation reduced to writing.

Section 16. Criminal prosecutions-rights of defendant. In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel; to demand the nature and cause of the accusation; to meet the witnesses against him face to face; to have process to compel the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed.

Section 18. Crimes-evidence against one's self-jeopardy. No person shall be compelled to testify against himself in a criminal case nor shall any person

be twice put in jeopardy for the same offense. If the jury disagree, or if the judgment be arrested after the verdict, or if the judgment be reversed for error in law, the accused shall not be deemed to have been in jeopardy.

Section 25. Due process of law. No person shall be deprived of life, liberty or property, without due process of law.

COLORADO REVISED STATUTES

1973, as amended, 1978

12-22-302. Unlawful to possess. It is unlawful for any person to manufacture, possess, have under his control, receive, sell, buy, conceal, prescribe, administer, dispense, or compound any narcotic drug except as authorized in this part 3, or to conspire to commit any of the acts prohibited.

12-22-322. Violations-penalties. (1) No person, with intent to induce or aid another to unlawfully use or possess narcotic drugs shall:

(a) Possess for sale a narcotic drug except in accordance with the provisions of this part 3;

(2) (b) Except as provided in subsections (6) and (7) of this section, whoever violates section 12-22-302 or 12-22-315 is guilty of a felony and, upon conviction thereof, shall be punished by a fine of not more than ten thousand dollars and by imprisonment in the state penitentiary for not less than two nor more than fifteen years for a first offense;

12-22-404. Unlawful acts. (1) Except as provided in section 12-22-405, the following acts are declared unlawful:

(a) To dispense any dangerous drug unless:

(1) The possession or use or attempt to obtain or procure the administration of cannabis, which shall be punished as provided in section 12-22-412 (12).

12-22-412. Violations-penalties. (1) Any person who manufactures or dispenses dangerous drugs in violation of section 12-22-404, except as provided in this section, is guilty of a felony and, upon conviction thereof, shall be punished by a fine of not more than one thousand dollars and by imprisonment in the state penitentiary for not less than one year nor more than fourteen years.

12-22-412 (6). Any person who possesses or uses any dangerous drug in violation of section 12-22-404 (1) (d), upon a first conviction, is guilty of a misdemeanor, and the court may:

(a) Impose a fine on the defendant in an amount not to exceed five hundred dollars, or a sentence of imprisonment in the county jail for not more than one year, or both such fine and imprisonment;

12-22-412(4)(d). Any person who possesses more than one ounce of cannabis or any amount of cannabis concentrate, upon conviction thereof, shall be punished as provided in subsection (8), (10), or (11) of this section.

16-3-106. Peace officer may pursue offender. When any peace officer is in fresh pursuit of any alleged offender, having a warrant for his arrest or having knowledge that such warrant has been issued, or, in the absence of an arrest warrant, when the offense was committed in the officer's presence or the officer has reasonable grounds to believe that the alleged offender has committed a criminal offense, and the alleged offender crosses a boundary line marking the territorial limit of his authority, such peace officer may pursue him beyond such boundary line and make the arrest, issue a summons and complaint, or issue a notice of penalty assessment.

16-3-301. Search warrants-issuance-grounds. (1) A search warrant authorized by this section may be issued by any judge of a court of record.

(2) A search warrant may be issued under this section to search for and seize any property:

(a) Which is stolen or embezzled; or

(b) Which is designed or intended for use as a means of committing a criminal offense; or

(c) Which is or has been used as a means of committing a criminal offense; or

(d) The possession of which is illegal; or

(e) Which would be material evidence in a subsequent criminal prosecution in this state or in another state; or

(f) The seizure of which is expressly required, authorized, or permitted by any statute of this state; or

(g) Which is kept, stored, maintained, transported, sold, dispensed, or possessed in violation of a statute of this state, under circumstances involving a serious threat to public safety or order, or to public health.

16-3-303. Search warrants-application. (1) A search warrant shall issue only on affidavit sworn to or affirmed before the judge and relating facts sufficient to:

(a) Identify or describe, as nearly as may be, the premises, person, place, or thing to be searched;

(b) Identify or describe, as nearly as may be, the property to be searched

for, seized, or inspected;

(c) Establish the grounds for issuance of the warrant, or probable cause to believe that such grounds exist; and

(d) Establish probable cause to believe that the property to be searched for, seized, or inspected is located at, in, or upon the premises, person, place, or thing to be searched.

(2) The affidavit required by this section may include sworn testimony reduced to writing and signed under oath by the witness giving the testimony before issuance of the warrant. A copy of the affidavit and a copy of the transcript of testimony taken in support of the request for a search warrant shall be attached to the search warrant filed with the court.

(3) Procedures governing application for and issuance of search warrants consistent with this section may be established by rule of the supreme court.

16-11-101 and 18-1-409 both pertain to Alternatives in sentencing and Appellate review of sentence for a felony. These have been cited in Argument IV pertaining to Amendatory legislation. Their text is not necessary as no provision appears in the statutes stating that defendants are entitled to amendatory legislation mitigating penalties for crimes. This appears in the case law cited in the discussion of the statutes themselves.

16-15-102. Ex parte order for wiretapping and eavesdropping. A copy of the text is included in the appendix.

18-1-405. Speedy trial. (1) Except as otherwise provided in this section, if a defendant is not brought to trial on the issues raised by the complaint, information, or indictment within six months from the date of the entry of a plea of not guilty, he shall be discharged from custody if he has not been admitted to bail, and, whether in custody or on bail, the pending charges shall be dismissed, and the defendant shall not again be indicted, informed against, or committed for the same offense, or for another offense based upon the same act or series of acts arising out of the same criminal episode.

(3) If a trial date has been fixed by the court, and thereafter the defendant requests and is granted a continuance for trial, the period within which the trial shall be had is extended for an additional six months' period from the date upon which the continuance was granted.

16-7-208. Failure or refusal to plead. If a defendant refuses to plead, or if the court refuses to accept a plea of guilty or a plea of nolo contendere

(no contest), or if a corporation fails to appear, the court shall enter a plea of not guilty. If for any reason a plea has not been entered, the case shall for all purposes be considered as one in which a plea of not guilty has been entered.

18-12-102. Possessing an illegal weapon. (1) As used in this section, the term "illegal weapon" means a blackjack, bomb, firearm silencer, gas gun, machine gun, short shotgun, short rifle, metallic knuckles, gravity knife, or switchblade knife.

18-12-105. Unlawfully carrying a concealed weapon-unlawful possession of weapons. (1) A person commits a class 2 misdemeanor if he knowingly and unlawfully:

(b) Carries a firearm concealed on or about his person; or

29-5-103. Assignment of police officers or deputy sheriffs for temporary duty. The chief of police or person performing the functions thereof of any town, city, or city and county or the sheriff of any county may in his discretion, upon request of the chief of police or person exercising the functions thereof in any other town, city, or city and county or the sheriff of any other county, assign police officers or deputies under his control, together with any equipment he deems proper, to perform temporary duty within the jurisdiction of the requesting chief of police or sheriff and under the direction and command of such requesting chief of police or sheriff; but the chief of police or sheriff so assigning such officers or deputies may provide that such officers or deputies shall be under the immediate command of a superior officer designated by such assigning chief of police or sheriff, which superior officer shall be under the direct supervision and command of the requesting chief of police or sheriff. Nothing contained in §§29-5-103 to 29-5-110 shall be construed to limit the power of any town, city, or city and county to prohibit or limit by ordinance the exercise by a chief of police or sheriff of the discretion granted in §§29-5-103 to 29-5-110.

Amendments to Above

12-22-322, 1980 Cumulative Supplement. Violations-penalties.

(2) (b) Except as provided in subsection (6) of this section, whoever violates section 12-22-302 or 12-22-315 commits a class 4 felony and shall be punished as provided in section 18-1-105, C.R.S. 1973. A second offense and each subsequent offense thereafter by such person are class 3 felonies.

Source: Amended, L. 77, pp. 648, 873, §§2, 33; Amended, L. 79, p. 470, §1.

12-22-412, 1980 Cumulative Supplement. Violations-penalties-nonseverability. (1) Any person who manufactures or dispenses dangerous drugs in violation of section 12-22-404, except as provided in this section, commits a class 4 felony and shall be punished as provided in section 18-1-105, C.R.S. 1973.

Source: (1) to (4), IP (10), and (12) (g) amended and (11) R&RE, L. 77, pp. 874, 875, §§34, 35; (6.5) and (12) (j) added and (12) (g) amended, L. 79, pp. 473, 1015, 474, §§4,2, 1.

18-1-105, as amended by House Bill No. 1589. Felonies classified, presumptive penalties. (1) (a) Felonies are divided into five classes which are distinguished from one another by the following presumptive ranges of penalties which are authorized upon conviction:

The 1979 version reads:

Class	Presumptive Range
3	Four to eight years plus one year of parole
4	Two to four years plus one year of parole
5	One to two years plus one year parole

(6) In imposing a sentence to incarceration, the court shall impose a definite sentence which is within the presumptive ranges set forth in subsection (1) of this section unless it concludes that extraordinary mitigating or aggravating circumstances are present, are based on evidence in the record of the sentencing hearing and the presentence report, and support a different sentence which better serves the purposes of this code with respect to sentencing, as set forth in section 18-1-102.5. If the court finds such extraordinary mitigating or aggravating circumstances, it may impose a sentence which is lesser or greater than the presumptive range; except that in no case shall the term of sentence be greater than twice the maximum nor less than one-half the minimum term authorized in the presumptive range for the punishment of the offense.

Source: (1), (6), and (7), R & RE and (1) (c) amended, L. 79, pp. 669, 700, §§16, 69.

H.B. 1589, 1977 version, Colo. Sess. Laws 1977 Chapter 218 p. 867 §15

Class	Sentence
3	4½ years
4	2 years

5 18 months

The 1977 version also provided for a one-half increase in the sentence should extraordinary mitigating or aggravating circumstances be found.

The 1977 version contained a provision which stated that it pertained to all cases which had not become final 120 days prior to its effective date. Both the 1977 version and the 1979 version became effective on the same day and the final version reads as follows:

Section 23. Section 79 of chapter 216, Session Laws of Colorado 1977, as amended by section 1 of chapter 1, Session Laws of Colorado 1978, First Extraordinary Session, is amended to read:

Section 79. Effective date. This act shall take effect ~~April 4, 1979~~ July 1, 1979.

Section 25. Effective date-applicability. This act shall take effect July 1, 1979, shall apply to offenses committed on or after said date, and, notwithstanding any other provision of law or court rule, shall not apply to offenses committed prior to said date.

1981 Cumulative Supplement, 12-22-401 to 12-22-415. Repealed, L. 81, p. 741, §39, effective July 1, 1981.

18-18-105, 1981 Cumulative Supplement. Unlawful distribution, manufacturing, dispensing, sale, or possession. (1) (a) Except as authorized by part 3 of article 22 of title 12, C.R.S. 1973, it is unlawful for any person knowingly or intentionally to manufacture, dispense, sell, or distribute, with or without remuneration, to possess, or to possess with intent to manufacture, dispense, sell, or distribute, with or without remuneration, a controlled substance; or to induce, attempt to induce, or conspire with one or more other persons to manufacture, distribute, sell, or distribute, with or without remuneration, or to possess with intent to manufacture, dispense, sell, or distribute, with or without remuneration, a controlled substance.

(2) Any person who violates any of the provisions of subsection (1) of this section:

(a) In the case of a controlled substance listed in schedule I or II of part 3 of article 22 of title 12, C.R.S. 1973, commits:

(I) A class 3 felony; or

(c) In the case of a controlled substance listed in schedule IV of part

3 of article 22 of title 12, C.R.S. 1973, or marihuana or marihuana concentrate, except as provided in section 18-18-106, commits:

(I) A class 5 felony; or

(d) In the case of a controlled substance listed in schedule V of part 3 of article 22 of title 12, C.R.S. 1973, commits:

(I) A class 1 misdemeanor; or

COLORADO RULES OF CRIMINAL PROCEDURE

Rule 41: Copy of text included herein. Search, Seizure, and Confession.

Rule 48. Dismissal.

(b) By the Court.

(1) If, after the filing of a complaint, there is unnecessary delay in finding an indictment or filing an information against a defendant who has been held to answer in a district court, the court may dismiss the prosecution. Except as otherwise provided in this Rule, if a defendant is not brought to trial on the issues raised by the complaint, information, or indictment within six months from the entry of a plea of not guilty, he shall be discharged from custody if he has not been admitted to bail, the pending charges shall be dismissed, whether he is in custody or on bail, and the defendant shall not again be indicted, informed against, or committed for the same offense, or for another offense based upon the same act or series of acts arising out of the same criminal episode.

(3) If a trial date has been fixed by the court, and thereafter the defendant requests and is granted a continuance for trial, the period within which the trial shall be had is extended for an additional six months period from the date upon which the continuance was granted.

STATEMENT OF THE CASE

(g) ARGUMENT I

This issue is the first issue Appellant attempted to file in the courts. First by letter to the Judge and then through motions to the Courts. The reason Appellant raised this issue is because his former attorney only raised on point of error on appeal. Prior to this he had led Appellant to believe that he would appeal all issues that he had raised during the court proceedings held in this matter and all issues that had been raised in the Motion For New Trial. Appellant also had many disagreements concerning his attorney's handling of the pre-trial and trial proceedings. Appellant then became convinced that his attorney was acting as an amici curiae for the court rather than as an advocate of Appellant's cause. Due to these irreconcilable differences between Appellant and his attorney Appellant sought to proceed Pro Se. In support of his motions Appellant relied on the "deliberate by-pass rule" which states that a choice made by counsel not participated in by the petitioner does not automatically bar relief, Fay v. Noia, 372 US 391 (1963). Appellant also relyed on the "cause" and "actual prejudice" as stated in Wainwright v. Sykes, 433 US 72 (1977). Other cases Appellant relied on are: Scobie v. Oklahoma, 239 F.Supp. 646 (1965); Cruz v. Patterson 253 F.Supp. 805 (1966); Ellis v. United States,356 US 674 (1958); Draper v. Washington, 372 US 487 (1963); Griffin v. Illinois, 351 US 12 (1956); Coppedge v United States, 369 US 438 (1962); Eskridge v. Washington State Board of Prison Terms and Paroles, 357 US 214 (1958); Henry v. Mississippi, 379 US 443 (1964); Anders v California, 386 US 738 (1967); Warden v. Hayden, 387 US 294 (1967). Appellant has also recently added Engle v. Isaac, US No. 80-1430 and United States v. Frady, No. 80-1595, 71 L.Ed.2d 816 (1982) to this argument. Appellant was granted this motion by the Supreme Court of Colorado On January 15, 1981 and given leave to file a pro se brief in support of any arguments he wished to raise on appeal and the prosecution conceded to this on page 1 one of his brief. And yet the Court did not rule on all issues and did not grant Appellant a Limited remand to the trial court on the issues raised in his Motions For Rehearing. This was error and this case should be remanded so that a proper determination of all the issues presented herein can be properly ruled on and so that all remedies can properly be exhausted on all issues.

ARGUMENT II

This issue was first raised at the Motion to Suppress hearing held on

August 27, 1979, (Tr. 542-591). This was also raised in Appellant's Motion For New Trial and was believed to be Appellant's most meritorious point of Appeal at one time. This was not appealed however and is one of the principal reasons Appellant eventually decided to procede Pro Se. All issues concerning this issue have been properly raised throughout the proceedings as it has been in all of Appellant's motions and briefs to the court. Some of the aspects of this issue such as the search of the containers and suitcases in the trunk and the issues concerning the filling in of the blanks were not raised until Appellant was proceeding Pro Se.

The ruling of the Supreme Court of Colorado appears to uphold the seizure and later search of Appellant's car as incident to arrest. The car was not seized incident to arrest because Appellant was not arrested in the car but was arrested inside the motel room. Coolidge v. New Hampshire, 403 US 443 (1971). Appellant was arrested and handcuffed inside the motel room (Tr. 669-670, 1122-1145). There was also no reason to believe that Appellant or anyone else had access to the car or evidence thereof due to the fact that Appellant was jailed immediately after being arrested, there was no knowledge that anyone else had a key to the car or that anyone else even knew of Appellant's whereabouts. The seizure was also illegal as the car was parked on private property and no warrant of forfeiture or any violation of law was presented to warrant this seizure and no request by the owner of the property or Appellant was ever made to warrant the removal of the car from the motel parking lot (Tr. 691-695, 748-751). It is well settled law that a search incident to arrest is limited to the person of the defendant and the area "within his immediate control"--Meaning the area from within which he might gain possession of a weapon or destructible evidence. There is no comparable justification, however, for routinely searching any room other than that in which an arrest occurs. Such searches, in the absence of well recognized exceptions, may be made only under the authority of a search warrant. Chimel v. California, 395 US 752 (1969); Coolidge v. New Hampshire, supra; Terry v. Ohio, 392 US 1 (1968); Sibron v. New York, 392 US 40 (1968). Appellant was arrested in the motel room and that is the only place that could properly be searched as incident to arrest.

There was also no probable cause to support the seizure and later search of the car as incident to arrest. To support this contention it must be shown that there was probable cause to believe that there was contraband in the car

and that there exists a nexus--automatically provided in the case of fruits, instrumentalities or contraband--betweent the item seized and criminal behavior. Thus in the case of 'mere evidence,' probable cause must be examined in terms of cause to believe that the evidence sought will aid in a particular apprehension or conviction. The validity of the probable cause must be appraised by the facts revealed to exist at the time of the seizure and not those later found to exist by the executing officers. Warden v. Hayden, 387 US 294 (1967); Stoner v. California, 376 US 483 (1964); Carroll v. United States, 267 US 132 (1925); Dyke v. Taylor Implement Mfg. Co., 391 US 216 (1968); United States v. Klein, 565 F.2d 183 (1977). The affiant stated that he was looking for residue left by the marijuana that had previously been in the car (Tr. 709-715). He says that he does not know how it gets there but some is always left in the place where marijuana has been stored or transported in. No search for residue was ever made for this residue inside the trunk of the car but only the suitcases and other containers were searched. This was clearly a search for evidence of crimes other than for what Appellant had been arrested for in the motel, sale of dangerous drugs, and even if they had been looking for the residue, this would not be evidence of the crime in question. Although both the evidence in the motel room and the evidence in the car was used to support the evidence of sale and possession (Tr. 893-895, 1614-1619), this was improper as the evidence in the car would only support a possession charge. The affiant could produce no other reason why he thought that contraband may be in the car. In fact, both the informant and the affiant stated that they had no reason to suspect that there was contraband in the car and did not know what was in it until it was searched (Tr. 630-631, 694-695, 662-663). Another case exactly like Appellant's is People v. Singleton, Colo., 482 P.2d 979 (1971). Thus there was no probable cause nor exigent circumstances justifying the seizure and later search of Appellant's car.

The search for traces of marijuana was illegal because,as previously stated, it was not a search for evidence of the crime for which Appellant was arrested and it is also not evidence which could be used as evidence of another crime as the mere traces or residue could not support conviction of another crime. People v. Theel, 505 P.2d 964 (1973); Fagin v. People, 505 P.2d 964 (1973).

All the cases relied on by the prosecution and in the decision of the Supreme Court of Colorado also support Appellant's argument rather than the

prosecution. Cardwell v. Lewis, 417 US 583 (1974) was not a search of the interior of any part of the car but involved the search of the outside of the car and was a plain view seizure. The other cases, Chambers v. Maroney, 399 US 42 (1970); United States v. Matthews, 615 F.2d 1279 (1980); Haefell v. Chernoff, 526 F.2d 1314 (1975); and People v. Meyer, Colo. 628 P.2d 103 (1981) all involved instances in which the defendant was arrested in his car rather than in his home or motel room or other place as in Appellant's case. All the searches also involved a search for evidence of the crime that had been committed by the defendant. Another case in support of Appellant's argument is Preston v. United States, 376 US 364 (1964) in which the defendant was arrested for vagrancy and the Court suppressed all evidence found in the car stating that it was apparent that the officers had no cause to believe that there was evidence of the crime of vagrancy concealed in the automobile.

The search of the car itself was not itself incident to arrest as the car was towed to a garage, impounded, and sealed by the police (Tr. 685-693, 748-753). As previously mentioned, Appellant was handcuffed upon arrest and incarcerated in the county jail. Thus the search must depend on the sufficiency of the facts contained in the warrant and affidavit. United States, v. Meier, 602 F.2d 253 (1979); Chambers v. Maroney, supra; Coolidge v. New Hampshire, supra; Stoner v. California, supra; Carroll v. United States, supra; Cardwell v. Lewis, supra; United States v. Matthews, supra; Dyke v. Taylor Implement Mfg. Co., supra.

The search warrant and affidavit did not meet the requirements of a finding of probable cause as set forth in Aquilar v. Texas, 373 US 108 (1964); Spinelli v. United States, 393 US 410 (1969); Steele v. United States, No. 1, 267 US 498 (1925); People v. Brethauer, Colo, 482 P.2d 369 (1971); Hernandez v. People, Colo., 385 P.2d 996 (1963); 16-3-303, C.R.S. 1973; Rule 41 Colo.R.Crim.P. 1973. All affidavits for search warrants must be based upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. In Colorado this affirmation must be reduced to writing and contained in the affidavit itself. As stated above, the affiant had no reason to believe that there was more contraband in the car. At (Tr. 685-690) the affiant states that he seized the car without a warrant in order to get a warrant to search the car. Therefore, not only was the car seized without probable cause but was also seized without a warrant. The affiant and the informant both stated that they had no reason to believe there was any more

marijuana in the car as stated above but yet they seized it in order to get a warrant to search it. The affiant and the prosecution both attempted to introduce evidence to support a finding of probable cause but they failed to include this in the warrant (709-715, 763-764). This is erroneous as the warrant validity must be appraised by the facts revealed to the magistrate and not those later found to exist by the executing officers. Aquilar v. Texas, supra; Spinelli v. United States, supra; People v. Brethauer, supra; Hernandez v. People, supra; United States v. Klein, 565 F.2d 183, 185 n. 4 and 8 (1977). The only things included in the warrant were events that allegedly occurred at appellant's house and a recitation of the events that occurred in the motel room. It is possible that probable cause may have been shown to search the house but there was clearly no probable cause to search Appellant's car. Other cases in support of Appellant's argument are: Giodenello v. United States, 357 US 480 (1958); Jaben v. United States 381 US 214 (1965); Nathanson v. United States, 290 US 41 (1933); Jones v United States, 362 US 257 (1960);Grau v. United States, 287 US 124 (1932); Byars v. United States, 273 US 28 (1927); Dumbra v United States, 268 US 435 (1903); People v. Drumwright, 475 P.2d 329 (1970); People v. Clavey, 530 P.2d 491 (1975); People v. Padilla, 511 P.2d 480 (1973); People v Arnold, 509 P.2d 1248 (1973).

The affiant further showed that the car search was exploratory by his use of the word "may" in the phrase "that a further quantity of dangerous drugs and/or traces of marijuana may be located in the above described car. This word means possibility and denotes that the search is an uncertain thing which may be fruitful, but if it were fruitful it would be remote or extraordinary. Black's Law Dictionary 5th Edition. He should have used a more positive word such as "is" which he used in the begining of the last paragraph of the affidavit which states "That this officer therefore has reason to believe that marijuana <u>is</u> located in the house of Richard Velasquez at 30 West North 4th Street in Montrose,". It is clear from this wording that the affiant was positive that there was marijuana in the house but was only guessing as to whether there was any in the car or not. This is because the informant had stated that he had previously observed marijuana in Appellant's house and this was contained in the warrant. However, no such reasons were contained in the warrant for the car. All the cases cited above support this paragraph also.

The affidavit and warrant also fail to particularly describe the place to be searched, and the things to be seized. This is because the affiant uses the word marijuana throughout the affidavit and then suddenly changes to the use of

both the words "dangerous drugs" and "marijuana" in the last paragraph of the affidavit. No explanation is given for this. Defendant concedes that marijuana is a dangerous drug but there are many different kinds of dangerous drugs and this term could mean many different kinds of drugs. Since the term marijuana was used throughout the affidavit in this case and in fact only this one kind of dangerous drug had been seen by the informant, the sudden change in terminology would lead a reasonable man to believe that something other than marijuana is being searched for. There was never any mention of any other kind of dangerous drug and there was no reason to use any other word than marijuana in this case. Even the affiant stated that he only had probable cause to believe that only traces of marijuana were thought to be located in the car. This was in his feeble attempt to explain his reasons for searching the car (709-715). People v. Brethauer, supra, also involved a similar situation. The affiant also failed to state where the car was located at. In the affidavit it appears that the car was located at Appellant's house rather than in the impound yard. The warrant and affidavit is also fatally defective because it fails to state what Judge of what court signed the warrant. The blank was also not filled in which states who the affiant appeared before and who is authorized to issue warrants in a criminal case. The Court summarily disposed of these last three contentions as being without merit in footnote 9 p. 13 of its opinion.

The court failed to rule on the issue of the search of the suitcases and other containers in the trunk without a warrant. This issue was first raised in Appellant's Opening Brief of May 12, 1981. This should have been raised as it is obvious that no probable cause existed to search these closed containers. This is because no search was made for the traces of marijuana in the trunk itself despite the fact that the affiant said he thought that these traces would have leaked out of the original container and fallen into the trunk. The only search that was made was of the containers inside the trunk itself. It is illogical for a reasonable man to hink that traces of marijuana would fall out of a closed plastic zip-lock bag that was inside another sack or box and go inside of another closed container inside the trunk. It would be logical to look for these traces on the floor of the trunk or on the outside of the containers rather than on the inside of the containers. There was also evidence that the bag and box in the motel room that was believed to contain the marijuana had no holes in them. A case in support of this issue is United States

v. Chadwick, 433 US 1 (1977); United States v. Chadwick, 532 F.2d 773 (1976); People v. Clavey, supra; Arkansas v. Sanders, 412 US 753 (1979); United States v. Stevie, 582 F.2d 1175 (1978); United States v. Schleiss, 582 F.2d 1166 (1978).

Thus all evidence should have been suppressed and Appellant remanded for a new trial. Wong Sun v. United States, 371 US 471 (1963); Beck v. Ohio, 379 US 89 (1964); Mapp v. Ohio, 367 US 643 (1961); Condon v. People, 489 P.2d 1297 (1971); all other cases cited herein.

ARGUMENT III

This issue was presented in Appellant's brief of May 12, 1981 as Argument V. This issue contains many issues that Appellant were in disagreement over throughout the proceedings. Appellant had no prior legal training and therefore did not know what to do about these things. Appellant did write to the trial Judge and filed motions with the courts concerning them and was thus allowed to proceed Pro Se and allowed to file motions concerning this. Some of the issues were not presented to the courts below because Appellant did not know at that time that he could do anything about them, but has since that time found case law to support these contentions and has thus discovered that they are in fact plain error. The Colorado Supreme Court ruled that there is not even a suggestion in the record that the defense counsel's representation was anything less than competent. Appellant was unaware of the date of the hearing and thus did not present any more argument prior to the hearing but presented all his research in his Motions For Rehearing. Appellant had intended to file a supplemental or reply brief prior to the hearing but was never informed of the fact that a hearing was set and thus was under the impression that one had not been scheduled as yet. Appellant now presents the following Argument which in its entirety plainly shows that Appellant's attorney's performance in this matter was totally incompetant and that Appellant did not have assistance of counsel at any stages of the proceedings.

Appellant was denied effective assistance of counsel from the time that the court dismissed the public defender from his case on March 20, 1979 and instructed to hire his own attorney. This was due to the fact that a sum of money, $1,919.00, that had previously been confiscated from Appellant was returned to him and the court thus ruled that Appellant could now afford to retain his own counsel. Appellant's bail had also been raised from $10,000 to $25,000 on March 8, 1979 and thus Appellant was left with the choice of making bail or attempting to hire an attorney, (Tr. 533-535). Appellant did attempt

to hire an attorney but could not find one that would take the case for less than $3,000 retainer. Since Appellant did not have this amount he decided to make bail and go to work and attempt to earn enough to hire an attorney. The bondsman agreed to 10% of the bond for his fee and allowed Appellant to pay the balance on an installment plan. It was error for the court to fail to appoint counsel for Appellant solely because he had money for bail. People v. Eggers, 188 N.E.2d 30 (1963). An indigent should be provided counsel at state expense. Gideon v. Wainwright, 372 US 335 (1963); Escobedo v. State of Illinois, 378 US 478 (1964); Palmer v. District Court, 398 P.2d 435 (1965).

The most obvious example of Appellant's attorney's incompetance is shown by his closing argument (Tr. 1625-1644). In this closing argument Appellant's counsel stressed to the jury that Appellant was guily and of bad character and the type of person no one would want to have as their child, would not want to associate with and that he was having a hard time coming up with good things to say about him. Thus, if the jury had any doubts up to that time, as to Defendant's guilt, they were all dispelled with this speech. It was obvious that Appellant's attorney was not prepared for trial nor had he fully researched and investigated Appellant's case and definitely had not prepared a defense. Although Appellant had not entered a plea, the court had previously entered a not guilty plea for him (Tr. 939) and Appellant proceeded to trial as if he had entered the plea himself. Appellant's counsel made his remarks with the knowledge of Appellant's earlier "not guilty" plea, and without Appellant's consent. He in effect entered a "guilty" plea for Appellant. The guilt or innocence of an accused is not a proper subject for argument to the trier of fact and the decision to plead "guilty" or "not guilty" is a decision reserved solely for the accused based on his intelligent and voluntary choice. Canon 7 (EC 7-24) of the Code of Professional Responsibility of the ABA; Boykin v. Alabama, 395 US 238 (1969). Doing so is plain error and requires reversal. Wiley v Sowders, 647 F.2d 642 (1981); Commonwealth v. Lane, 382 A.2d 460 (1978). Thus Appellant's attorney should have requested a continuance so that he could have properly prepared a defense and to properly investigate all aspects of this case as is stated above and below in this Jurisdictional Statement. The record as shown may show that Appellant's attorney did raise a few issues properly and did perform well enough to show that he is familiar with the procedures but the record as a whole plainly show that his performance was incompetant, particularly his closing argument. There were also many aspects of the errors that he did

raise that he could have raised but did not. These are all basic errors and which are plainly stated in the law books and which any experienced attorney should know about or could locate very easily with a little bit of research. Appellant's attorney was an experienced attorney and should have been able to do this. He plainly did not have time to properly research this case and the fact that Appellant has since raised many issues in his behalf despite the fact that he has no prior legal training is further evidence of the fact that his attorney did not do a proper job. Thus Appellant should be granted a new trial and given sufficient time in which to prepare.

Additional errors that Appellant's attorney committed are as follows:

He failed to introduce the inaudible tape recording into evidence and also failed to have this tape recording analyzed. An expert could have been retained to analyze this tape as it would have proved to be exculpatory evidence for Appellant. This is shown by the confusion in the testimony of the informant and the arresting officers. They all did not hear all the testimony and did not take notes of any kind. They used the tape recording to refresh their memories. Appellant was told by his attorney that the tape was inaudible and yet this fact was not introduced into evidence. This was clearly incompetant and these facts are further discussed in Argument VII.

Appellant's attorney also failed to adequately argue and investigate the circumstances surrounding the identification of the substance charged in Count V. This is the alleged morphine and codeine. It is obvious that the prosecution has failed to prove that this substance was in fact a narcotic (Tr. 213-218, 248-262, 1277-1298, 1484-1495). The prosecution's experts performed many tests on this substance before an opinion could finally be formed as to what they thought this was. Even then no positive identification was made. Mr. Springer, Appellant's attorney, failed to obtain any evidence to positively rule out narcotics in this instance despite the fact that Appellant questioned him why the defense did not get an expert witness and have an independent test test of our own done on this substance. The prosecution's experts stated that there were many impurities in the substance thus making identification difficult (Tr. 255-260). There was testimony that it was opium incense (Tr. 260). That it was a possible opium alkaloid (Tr. 249, 1291, 1474). That opium is a complex mixture containing approximately twenty other alkaloids (Tr. 1474). No quantitative analysis was done (Tr. 1491-1495). A quantitative analysis should have been done as it is obvious from the testimony of the prosecution's witnesses

that a very minute quantity of narcotic, if any, was involved in this case. Thus it could possibly not be a crime. People v. Theel, 505 P.2d 964 (1973). Since there was testimony that there were many other substances present in this substance, it is also possible that this substance was not a narcotic but could have been one of the substances listed in 21 USCA 812 Schedule of controlled substances V which are now classified as misdemeanors pursuant to 18-18-105 (2) (d) (I), Colorado Session Laws 1981, Chapter 128 p. 730. There was no attempt to identify the impurities in the alleged substance (Tr. 258-259). If the impurities and other alkaloids would have been identified, it's possible that the substance would also be classified under Schedule III or V which contain minute quantities of narcotic combined with other substances. A schedule III drug is now punishable as a class 4 felony. The substances listed in schedule V are also listed in 12-22-308, C.R.S. 1973, as amended 1978 which were and are now punishable pursuant to 12-22-322, C.R.S. 1973, as amended 1978 (2) (a). At that time this type of crime could be punished by a maximum of five years in the penitentiary and is now punishable as a class 1 misdemeanor with a maximum of two (2) years in the county jail. If a proper identification of the alkaloids would have been done its possible that they could have been identified as one of the alkaloids that is not illegal. In Schedule II (2) it specifically excludes the isoquinoline aldaloids of opium from the controlled substance act. Schedule II (I) also excludes apomorphine, dextrorphan, nalbuphine, naloxone, naltrexone and their respective salts. Noscapine, papaverine, narceine, and cotarnine are excluded in 12-22-301 (16), C.R.S. 1973, as amended 1978. Thus it is obvious that independent testing should have been performed by the defense by their own expert.

Appellant's attorney also failed to raise the issue that there was insufficient evidence to warrant a conviction for both Counts I and II of the Information and was thus convicted in violation of the constitutional proscriptions against double jeopardy. As to count I, there was no evidence presented that Appellant solicited or brought about a sale but all the evidence presented states that the informant was responsible for this and thus Appellant should have only been found guilty of possession for sale rather than sale (Tr. 1062-1065). People v. Morris, Colo., 515 P.2d 131 (1976); People v. Patterson, Colo., 532 P.2d 342 (1975). A Defendant cannot be found guilty of both possession for sale and for possession. This also violates equal protection and due process.

Appellant's attorney also failed to object to the jury instructions as they were not adequate and failed to properly instruct the jury as to all the elements of the offense. The only elements presented in instruction No. 17 were for knowledge that it is a narcotic drug. The same knowledge instructions were also given for the dangerous drug charges in instructions No. 13 and 14. They failed to include the instructions for intentionally or willingly or for physical or constructive possession. Due process protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. In re Winship, 397 US 358 (1970). Instruction No. 23 also included many other drugs irrelevant to this case and the mention of which is also prejudicial to any trial, particularly heroin. The instruction also contained the charge of opium, morphine, and codeine. Morphine and codeine are derivatives of opium and thus if opium is present a person cannot also be charged with possession of each individual alkaloid in the drug. Opium contains approximately twenty alkaloids and in this case only two were thought to be present and thus Appellant should not have been charged with possession of opium and this should not have been presented to the jury.

ARGUMENT IV

This is an issue that Appellant has raised since the sentencing hearing (Tr. 1755-61). Appellant also included this in his Opening Brief of May 12, 1981. H.B. 1589 became effective July 1, 1979. This was prior to Appellant's trial of September 17, 1979. This bill contained two provisions which became effective on the same date, §23 and §25. Appellant was unaware of these two sections until he had an opportunity to study them in detail. The courts have summarily dismissed this argument stating that this bill had prospective application only. People v. McKenna, Colo., 611 P.2d 574 (1980).

Appellant also did not contest the sentence for Count V as he had originally thought that he had been convicted as a second offender for this crime and thus the sentence under §25 of the new bill would be similar to the one he already had as a class 3 felony carries a 4-8 year sentence under this section. 25 contained provisions for a 2-4 year sentence for a first offender and Appellant has since discovered that he was in fact convicted as a first offender. Count I is also a class 4 felony and contains a 2-4 year sentence under §25. Appellant subsequently discovered that §23 of the first version of H.B. 1589 also became effective July 1, 1979. Tacorante v. People, Colo., 624 P.2d 1324 (1981). Thus even if Appellant would have been convicted as a second offender

on Count V he could receive a 4½ year sentence under 23 and a two (2) year sentence for a first offense for which he was actually convicted. Appellant could now receive an eighteen (18) month sentence for Count I. This first version of H.B. 1589 is the 1977 version and it pertained to all cases that were not final before its effective date and those that were sentenced after the effective date. The first version was amended at the 1st Extraordinary Session in 1978 to take effect April 1, 1979 and the General Assembly postponed its effective date again at the 1979 session to become effective July 1, 1979. Appellant also submitted a copy of a brief,written in behalf of Edward Montoya, No. 80CA1257, to the Supreme Court of Colorado in support of this issue. Edward Montoya apparently has been granted a hearing on this issue in the Court of Appeals of Colorado. Appellant presented all this research in his Motions For Rehearing.

In addition to the above, Appellant has discovered that the drug laws have been changed again. Count I, Dispensing a dangerous drug, is now a class 5 felony pursuant to 18-18-105 (2) (c) (I), Session Laws 1981, Chapter 128, p. 730. This bill does not contain any language making it prospective only and thus it is retroactive and applies to Appellant's case. Thus Appellant is entitled to be sentenced under the presumtive range of one(1) to two (2) years. The changes in this law also classify marijuana as a class 5 felony. It was previously an unclassified offense and thus even if Appellant was to be sentenced under the legislation in effect in 1978 and the legislation that he was sentenced under, Appellant should be resentenced to a maximum of 5 years. A class 5 felony in 1978 carried a maximum of 5 year penalty in the penitentiary. The changes in this Session also classify Count 5 as a class 5 felony or a class 1 misdemeanor should Appellant be able to prove the facts as state in Argument III but would otherwise not affect Appellant's sentence. Thus Appellant should be resentenced under the amendatory legislation mentioned above. This Argument was previously Argument VI in the May 12, 1981 Opening Brief.

A defendant is entitled to the benefits of amendatory legislation which mitigates the penalty for crimes about the relief is sought before finality has attached to the judgment of conviction. Dalbert v. Florida, 432 US 282 (1977); Linkletter v. Walker, 381 US 618 (1965); People v. Bloom, 577 P.2d 288 (1978); People v. Jenkins, 575 P.2d 10 (1977); Litsey v. District Court, 565 P.2d 1343 (1977); People v. Vigil, 570 P.2d 13 (1977); People v. Henderson, Colo. App., 574 P.2d 872 (1977); People v. Truesdale, 548 P.2d 494 (1976); People v. Marlott,

532 P.2d 401 (1976); Glanier v. People, 565 P.2d 935 (1976); People v. Loger, 535 P.2d 210 (1975); McClure v. District Court, 532 P.2d 340 (1975); Shook v. District Court, 533 P.2d 41 (1975); Naranjo v. District Court, 536 P.2d 36 (1975); People v. Thomas, 525 P.2d 1136 (1974); People v. Thornton, 529 P.2d 628 (1974); People v. Race, 529 P.2d 629 (1974); People v. Andersen, 529 P.2d 310 (1974).

The failure to sentence Appellant under the new laws because failure to do so violates the equal protection clause. Appellant has not been able to research this point adequately but if the Court deems it proper Appellant will brief this to the Court also. It involves the changes concerning good-time-credits for inmates and the parole elegibility. Appellant only recently became aware of this issue upon his incarceration to the Department of Corrections of Colorado. Under the new laws an inmates good time is vested every six months and cannot be taken from him, only good time earned within the six month period can be lost for an infraction. Under the old laws an inmate could lose all his good time for infractions of the rule, this means all the time he has earned since he began serving his time. The inmates under the new laws are also granted an automatic parole no matter how many infractions they have committed while the inmates under the new laws must still meet the parole board and have an uncertain parole date. All the inmates serving time under both the new and old laws are housed in the same facility and are subject to the same rules and regulations. Appellant is now investigating the extent to which the old good time rules are enforced on the inmates or if the majority are treated the same as the inmates under the new legislation. It is obvious that all are not treated the same.

ARGUMENT V

This argument has been raised at all stages of the proceedings. It was raised immediately before trial (Tr. 801-839) and also raised in Appellant's Motion For New Trial. It was not appealed however and Appellant presented it as Argument II in his Opening Brief of May 12, 1981.

The United States Supreme Court has firmly established that the speedy trial application of the Sixth Amendment begins when the defendant becomes an accused which in most cases is the date of the indictment. United States v. Marion, 404 US 307 (1971); Strunk v. United States, 412 US 434 (1973); Barker v. Wingo, 407 US 514 (1972); Smith v. Hooey, 393 US 374 (1969); Moore v. Arizona, 414 US 25 (1973); Klopfer v. North Carolina, 386 US 213 (1967); Dickey v. Florida, 398 US 30 (1970).

The Federal right to a speedy and public trial is enforceable against the

states by virtue of the Fourteenth Amendment "as one of the most basic rights preserved by our Constitution". Klopfer v. North Carolina, supra. The nature of the speedy trial right does make it impossible to pinpoint a precise time in the process when the right must be asserted or waived, but that fact does not argue for placing the burden of protecting the right solely on defendant. A defendant has no duty to bring himself to trial; the State has that duty as well as the duty of insuring that the trial is consistent with due process. Moreover, society has a particular interest in bringing swift prosecutions, and society's representatives are the ones who should protect that interest. Barker v. Wingo, supra at 527. Similar statements appear in Dickey v. Florida, supra; Hodges v. United States, 408 F.2d 543, 551 (CA8 1969).

As a matter of Federal constitutional interpretation the entry of a plea is not required before the Sixth Amendment applies to the defendant but rather that the defendant in some way becomes an accused, which is generally on the date of the indictment; cases cited above. The United States Supreme Court stated that they find no constitutional basis for holding that the speedy trial right can be quantified into a specified number of days or months as such a result would require the Court to engage in legislative or rulemaking activity, rather than in the adjudicative process. They ruled, however, that the states, of course, are free to prescribe a reasonable period consistant with constitutional standards, but their approach must be less precise. Baker v. Wingo, supra, at 523. Colorado has adopted such a rule requiring trial to be had within six months. Colorado has also adopted an additional rule, requiring that the speedy trial time period does not commence to run until a plea has been entered. Sweet v. Myers, 612 P.2d 75 (1980); Sanchez v. District Court, 612 P.2d 519 (1980); Rance v. City Court in and For City of Jefferson, 564 P.2d 422 (1977); Potter v. District Court, 525 P.2d 429 (1974); People v. Wilkinson, 555 P.2d 1167 (1976); People v. Dunhill, 570 P.2d 1097 (1977).

It is firmly established that each state has the authority and power to impose higher standards governing police practices under State Constitutional law than is required by the Federal Constitution. Oregon v. Haas, 420 US 714, 719 (1975); Lego v. Twomey, 404 US 477, 489 (1972); Cooper v. California, 386 US 58, 62 (1967); Barker v. Wingo, supra. In fact, state courts are increasingly according protections once provided as Federal rights but now increasingly depreciated by decisions of the United States Supreme Court. State v. Santigo, 492 P.2d 658 (1971); People v. Disbrow, 545 P.2d 272 (1976); State

v. Johnson, 346 A.2d 66 (1975); Commonwealth v. Campana, 314 A.2d 854 (1974).

Although the United States Supreme Court allows the individual states to require a trial to be had within a prescribed number of days, this does not also allow states to impose standards by which the courts can intentitonally by-pass the defendant's speedy trial rights. This is what the requirement of entering a plea before the speedy trial period begins amounts to. This is imposing a lower standard rather than a higher standard. In Appellant's case, the trial was set on March 8, 1979 for September 17, 1979. This is clearly more than six months. The speedy trial time period is 180 days. Simakis v. District Court, 577 P.2d 3 (1978). Appellant's motion for dismissal was denied (Tr. 834) because there was no plea entered and the court also stated that the motion was not timely. (Tr. 801-840). The discussion of the trial setting and Appellant's failure to enter a plea appears at (Tr. 421-455). Although the court and the public defender discussed the six-month speedy trial rule on March 8, 1979, they completely ignored it in this case. They discussed a trial date being available on August 27, 1979. This date was rejected because the public defender was going on vacation that week (Tr. 448). The trial date was then set for September 17, 1979 based on the fact that the speedy trial period had not begun yet since no plea had been entered. This is clearly an abuse of discretion on the part of the court and the public defender. They avoided Appellant's right to a speedy trial in order to afford a vacation for the public defender. A vacation is not a valid excuse to ignore the constitutional rights of a defendant, who, in the meantime will be sitting in jail. Appellant's bond was raised that same day and Appellant was ordered to report to the custody of the sheriff. Appellant did not bond out for some time after that and it was uncertain whether he ever would. This amounted to a lessening of the Sixth Amendment speedy trial right because it allows the court to manipulate the trial date in order for vacations to be had or whatever other liesurely activity that is deemed more important than the Sixth Amendment. The public defender should have been ordered to appear on the date available or new counsel should have been appointed. People v. Johnson, 606 P.2d 738 (1980).

As for the timeliness of the Motion to Dismiss, both the Federal and State constitutions require only that it be made before trial commences. Harrington v. District Court in and For County of Morgan, supra. In Appellant's case the trial had not commenced as yet, the jury had not even been picked nor impaneled

yet. It was the day of trial and as Appellant's attorney stated at (Tr. 828), that he had only discovered the speedy trial issue within the last several days. Appellant's attorney couldn't have discovered it any sooner anyway since he had only been retained approximately 30 days prior to this.

As to waiving his right to a speedy trial, it has been held that mere silence to a trial setting beyond the speedy trial period shall not be construed as a waiver of a defendant's right to a speedy trial. It was further held that in such situations an express waiver or other affirmative conduct evidencing a waiver of the right to a speedy trial must be shown before a trial court may deny a dismissal motion. Harrington v. District Court, supra. Nowhere in the record does it show that Appellant waived his speedy trial rights nor waived entry of plea. On March 8, 1979 the court instructed the public defender to consult Appellant about a plea (Tr. 448). This was never done and the court also failed to consult Appellant as to whether he wished to enter a plea or not. At that time Appellant did not know that a plea was necessary in order for his speedy trial period to begin, Appellant did not even know what having a speedy trial meant. Appellant had never studied law before and only started doing so in the summer of 1979 as it appeared as if he would have to defend himself. It was the duty of the court to inform Appellant of his speedy trial rights and to protect those rights. Barker v. Wingo, supra. The court advised Appellant of his other rights and explained the charges to him (Tr. 393-421). The court addressed Appellant personally of these rights and other charges but did not do this for Appellant's speedy trial rights nor whether he wished to plea but kept this discussion between the court and the public defender. The court stated that it would ask Appellant if he wanted to enter a plea (Tr. 421) but never did do this. The court also concedes that the failure of Appellant to enter a plea was not his fault (Tr. 835). A man should not be presumed to have exercised a deliberate choice because of silence or inaction that could equally mean that he is unaware of the necessity for a demand. Barker v. Wingo, supra. As for demanding a speedy trial, Colorado has rejected the demand rule. Hicks v. People, 364 P.2d 877 (1961); Harrington v. District Court in and For County of Morgan, supra; Rance v. City Court in and For the City of Jefferson, supra. As for the contention that Appellant requested continuances of the date for enter of plea, this is without merit as Appellant only asked for a continuance of time inorder to obtain counsel. In any event, no continuances

of the trial were ever given and the trial setting remained the same from the time of the setting on March 8, 1979 until trial was had. There was actually no reason to request a continuance in order for Appellant to retain counsel as the public defender should have remained appointed until Appellant did retain counsel of his own and Appellant had requested so. These continuances are also meaningless as Appellant has the right to retain counsel at any time he wishes and does not need a continuance to do so. A trial date should not have been set until Appellant was represented by counsel.

The date of the trial setting is equivalent to an entry of plea as a trial date should not be set until a plea has been entered (Tr. 802-812). Also, according to 16-7-208, C.R.S. 1973, as amended, if a defendant fails to plead, the court shall enter a plea of not guilty. If for any reason a plea has not been entered, the case shall for all purposes be considered as one in which a plea of not guilty has been entered. Therefore a plea should have automatically been entered for Appellant, and even if one was not, the plea should be considered to be entered at the arraignment on March 8, 1979 and the speedy trial time period actually began on that date.

Appellant has been unable to discover another case with a single continuance that exceeds six months but 16-1-405, C.R.S. 1973, as amended, and 16-1-405 (3), C.R.S. 1973, as amended, plainly state that a continuance shall not exceed six months. Rance v. City Court in and For City of Jefferson, supra, seems to suggest that the trial setting involved the same circumstances as Appellant but no dates are mentioned in the case. Appellant's attorney also suggests that there is no case law on this particular point in Colorado (Tr. 824). Thus it is obvious from the above that Appellant's Constitutional right to a speedy trial have been violated and thus all charges must be dismissed. United States v. Marion, supra; all other cases cited above.

ARGUMENT VI

This issue has been raised throughout the proceedings and was an issue mentioned in the Notice of Appeal. This is also another issue which Appellant's attorney did not appeal and it appears as Argument III in Appellant's Opening Brief of May 12, 1981. The entire discussion at the Motion to Suppress hearing of August 27, 1979 appears at (Tr. 697-705, 742-744).

This issue involves an arrest that was the result of an investigation by the Montrose City Police that was conducted outside the city limits and thus outside their jurisdiction. The Montrose Police also consulted with the

Colorado Bureau of Investigations (CBI) acting as advisors (Tr. 699-701). No warrant was ever obtained by the Montrose City Police to conduct this investigation. The Montrose City Police also sought to explain their authority to conduct an investigation outside the city limits by stating that the officer in charge, Charles R. Sellers, carries a Deputy's card and had been specially deputized to be a Deputy by the Montrose Sheriff thus making him a City Police Officer and a Deputy Sheriff at the same time (Tr. 702-705). This is without merit however as an officer cannot be a City Police Officer and a Deputy Sheriff at the same time and there are no provisions for such a procedure in either the Statutes of Colorado or the City Ordinances of Montrose. The only provisions in the Statutes for assignment of City Police Officers as Deputy Sheriffs is for temporary duty as stated in 29-5-103, C.R.S. 1973, as amended. This statute only permits this at the request of the chief of police or sheriff of another county. There were no requests for this from officers of any kind from any other county. This was an investigation made by the City of Montrose Police by their own officers at their own request. This statute also states that an officer that is assigned for temporary duty shall be under the immediate command of a superior officer designated by such assigning chief of police or sheriff, which superior officer shall be under the direct supervision and command of the requesting chief of police or sheriff. The officers were not assigned to any other department but were working for their own Department during regular assignment rather than temporary duty. Detective Sellers was also the supervisor of the whole operation and was not under the supervision of anyone, although he was legally subject to the supervision of the Montrose Chief of Police. Thus the investigation was conducted by the Montrose City Police outside the city limits without a warrant and thus the presence of the CBI was the fruit of this illegal investigation and therefore the arrest was also illegal and it and all the fruits thereof must be suppressed. Wong Sun v. United States, 371 US 471 (1963); Condon v. People, 489 P.2d 1297 (1971); Weeks v. United States, 232 US 383 (1914); Mapp v Ohio, 367 US 643 (1961). There are no ordinances that state that officer Sellers could be a City Police Officer and a Deputy Sheriff also. Such a procedure can only be condoned by statute or ordinance pursuant to the Home Rule Amendment, Article XX §6 of the Colorado Constitution. International Brotherhood of Police Officers, Local No. 127 v. City and County of Denver, 521 P.2d 916 (1974). The conduct of the police has not been approved in this type of situation in other cases.

People v. Schultz, 611 P.2d 977 (1980); People v. Wolf, 635 P.2d 213 (1981). These two cases involved situations where the initial police activities began in their own jurisdiction and then led outside of it. In Appellant's case the investigation was being conducted outside the city limits and Appellant was lured from inside the city limits to the motel outside the city limits. Calling for the assistance of the CBI to effect the arrest would only have been proper if the Montrose City Police would have had a warrant or other legal authority to be conducting an investigation outside their jurisdiction.

ARGUMENT VII

This argument has been raised throughout the proceedings. This is the only argument Appellant's attorney appealed and an Opening Brief was filed in the Court of Appeals on May 19, 1980 on behalf of Appellant. Appellant agreed with his attorney that this was a meritorious point of appeal but that a Federal question should also be raised, Appellant's attorney only raised the question of a violation of State constitutional grounds only. Appellant raised this in his Opening Brief as Argument I. The Supreme Court of Colorado appears to have only ruled on the State ground also although it mentioned Federal cases in its opinion.

Appellant relied on the following cases for his argument. Katz v. United States, 389 US 347 (1967); Berger v New York, 388 US 41 (1967); United States v. White, 401 US 745 (1971); Desist v United States, 394 US 244 (1969). The White decision was based in part on the non-retroactivity of Katz and therefore Appellant relied on the strictures of Katz for his argument. These cases have apparently been overruled by United States v. Caceres, 440 US 741 (1979) and therefore Appellant's argument has lost some of its merit. Appellant's case does differ from the cases above in several respects however.

The bug in this case was placed in a location rather than on the person of the informant as was done in all of the above cases (Tr. 566). This was error. United States v. Padilla, 520 F.2d 526 (1975); Electronic Eavesdropping and the Right to Privacy, 52 B.U.L. Rev. 831 (1972). This type of procedure allows the agents outside to listen even if the informant is not present and would allow a situation where the whole conversation might not be heard. There were many interruptions in the conversation in this case (Tr. 661).

The purpose of a bug is also to have a more accurate version of the events in question. United States v. White, supra. All the cases mentioned above that have allowed the officers listening outside to testify at trial have also intro-

duced the tape recording into evidence to corroborate the testimony of the agents. The agents testimony should have been suppressed in this case as it was all unreliable. The informant's testimony was so incredible that the Court even admonished him as being unreliable and unpredictable (Tr. 11058). At trial, police informant Walsh testified that although he was remembering things differently at trial (Tr. 972), had smoked marijuana with Appellant and on other occasions (Tr. 974-975; 985; 1010), could not remember dates (Tr. 931-932, 961), took no notes of the meetings with Appellant (Tr. 961-962, 969), made other investigative contacts with other individuals on a daily basis (Tr. 960-969), could not remember how long he met with Appellant (Tr. 972, he could recall purchasing marijuana from Appellant on December 22, 1978 (Tr. 917-925). It is highly unlikely that the informant's memory could be so faulty. The theory of primacy and recency holds that a person generally remembers the first and last meetings or happenings between persons. The informant could remember neither and thus it is suspect that any of what he said actually happened, especially since he didn't take any notes during his investigative activities. The agents testimony was just as suspect. Officer Sellers stated at (Tr. 658) that Appellant was hard to understand, and yet at (Tr. 1105-1107) he states that he did hear a sale take place although he said he wasn't quoting Appellant exactly. At (Tr. 661) officer Sellers states there were many interruptions in the conversation. He further states at (Tr. 660-664) that Appellant was encouraging the informant to give him the money so he could go to Grand Junction to purchase sesamian marijuana. He also states that there was other discussion that he doesn't remember. At (1222-1229) officer Sellers states he paraphrased the conversation between the Appellant and the informant. He states that he didn't take any notes on the conversation, although he took notes on everything else and which is standard procedure. In his testimony, officer Sellers states that taking notes is standard procedure in police work and is done routinely in all investigations that he does, and yet he failed to do so in this instance. Why?! As for Agent Konkel, he states at (Tr. 1531) that he only heard talk of marijuana and of Walsh counting money. He never states that he heard a sale take place. It is plain from the above discussion that an accurate version of the events and conversation was not presented to the court. No sale actually took place. The plan was for Appellant to take the informant's money and go to Grand Junction to look for some sesamian marijuana. No promises were made, it was just agreed that it may be possible to locate some there. The agents should

not have been allowed to testify unless the tape recording was introduced in evidence also. A warrant should have been issued before the bug was placed in the room and most definately should have been issued before the agents could be allowed to listen and record the conversation from outside. The warrant should also stress that a proper tape recording be made of the conversation if the agents are to be permitted to testify and an instruction should be presented to the jury explaining why a tape recording is not being used if in fact one was made.

It is well established that the testimony of an informant is allowed at trial without a warrant but many jurisdictions require that a warrant be issued before the informant is allowed to wear a bug on his person, to place a bug in a location or to allow agents listening in on the conversation to record such conversation or to testify to its contents. People v. Beavers, 227 N.W.2d 511 (1975); Tollett v. State, 272 So2d 490 (1973); State v. Brackman 582 P.2d 1216 (1978); State v. Coleman, 616 P.2d 1090 (1980); State ex. rel. Arnold v. County Court of Rock County, 187 N.W.2d 354 (1971); Wallace v. United States, 412 F.2d 1097 (1969); State v. Wanrow, 559 P.2d 548 (1977); State v. Glass, 583 P.2d 872 (1978); State v. Thornton, 583 P.2d 872 (1978); Aldridge v. State, 584 P.2d 1105 (1976); Coffey v. State, 585 P.2d 514 (1978); Hammond v. State, 354 So.2d 280 (1977); State v. Boone, 581 P.2d 571 (1978); Franco v. State, 376 So.2d 1168 (1979); People v. Mosley, 370 N.E.2d 1240 (1978); White v. Davis, 533 P.2d 222 (1975); State v. Sarmiento, 397 So.2d 643 (1981). Thus the United States Constitution should also afford such protection to its citizens.

The Supreme Court of Colorado also erroneously relied upon three or four prior allged sales between Appellant and the informant. This appears on p. 3 of the opinion. These alleged sales were never proven and the evidence surrounding them was so incredible that the court did not allow them into evidence. There were no offense reports and they were ruled hearsay only (Tr. 842-867). (h). Appellant raised both State and Federal Constitutional issues in all his arguments and were all plain error and thus the court should have ruled on both State and Federal grounds on all issues. This is also the issue in Argument VIII. Thus these questions are so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution in the Supreme Court of the United States of America. They all present plain error and warrant reversal of the decision of the Supreme Court of Colorado.

ARGUMENT IX

Appellant should have been granted a Rehearing in this matter because he had not been notified of the date of the hearing and thus was under the impression that no hearing date had been set yet. Appellant had been preparing for the hearing for some time and had much to add to his Opening Brief of May 12, 1981. Appellant had been under the impression that he would be allowed to file a supplemental or reply brief prior to the hearing. Colorado Appellate Rule 30 states that the Appellant must file a reply brief at least three (3) days before argument. Appellant had intended to file a brief concerning his research since May 12, 1981 more than three days prior to the hearing but was denied this opportunity since he was not informed of the hearing. Appellant also thought he might be given Oral Argument pursuant to Colorado Appellate Rule 34. Appellant first found about his hearing in the newspaper when an inmate showed him the article in the Denver Post, February 17, 1982. Appellant was given the opportunity to file a Motion For Rehearing and in fact filed two (2) of them, one dated March 2, 1982 and one dated March 22, 1982. It is obvious the Supreme Court of Colorado misinterpreted and overlooked all of Appellant's argument and this was clearly pointed out in Appellant's Motions For Rehearing and thus Appellant should have been granted a Rehearing.

ARGUMENT X

The Supreme Court of Colorado erred in not granting Appellant a Limited Remand to the trial court. Appellant has discovered many issues that are plain error in this case since beginning his research in this case and this is the reason he requested a limited remand to the trial court or permission to file a Rule 35 motion while this appeal is pending. Rule 35 of the Colorado Rules of Criminal Procedure is the Rule that contains the provisions for collateral relief from convictions in Colorado. Many of these issues have not previously been presented to the courts below and thus all appellate remedies have not been exhausted. Many of the issues that have been properly presented to the courts also have been changed and present issues not properly presented to the courts and that all appellate remedies have not been exhausted. Appellant was unable to discover what the proper procedure is for adding these other issues and asked the courts for advice but received no help from them. They stated that they could not advise Appellant as to procedure. Appellant has read conflicting court decisions concerning the adding of points of error to an appeal that were not in the original appeal and the filing of another appeal while

another appeal is pending in the same case. Some say that it is proper to add points of error to an appeal if they are plain error, some say that another appeal can be filed while another is pending, some say that filing another appeal while one is pending in the same case would jeopardize the case and it could be dismissed, and some say that a compelling need for another appeal must be shown. People v. Hampton, 528 P.2d 1311 (1974); People v. West, 592 P.2d 22 (1979). And finally Appellant read that the proper procedure is to request a limited remand to the trial court or permission from the appellate court to file Rule 35 motions below while another appeal is pending in another court above. People v. District Court, Colorado Supreme Court, No. 81SA417, December 14, 1981. Appellant filed such a request dated March 22, 1982 which accompanied Appellant's Motion For Rehearing dated the same day.

Appellant's need is also evident due to the fact that should he be ruled to be entitled to the amendatory legislation mitigating the penalties for his crimes he will have done all his time by the time he could present this issue to the court and thus it could possibly be ruled moot. If Appellant would be ruled to be sentenced to two (2) years under the new laws he would be eligible for release in December of 1982 if he earns all his good time. Appellant mentioned this possibility in his Motion For Stay and Bail Pending Review and Remand dated March 22, 1982 and also accompanying the Motion For Rehearing and Motion For Remand dated the same day.

Appellant also has another reason for a present need to present these issues to the Court at this time. Appellant now has other charges pending, these arose out of the incident in which Appellant's Appeal bond was revoked, which are being inhanced under recidivist statutes due to the fact that Appellant has previously been convicted of the charges that are the subject of this appeal. These appear in counts III and VI of the Amended Information in Action No. 82CR2, a copy is included herein. The original Information has been filed since January 1982 and the Amended Information was mailed to Appellant May 26, 1982. Thus Appellant has decided to request this Honorable Court to do one of the following:

(1). Consider all of the above arguments at this time despite the fact that all appellate remedies have not been exhausted on all the issues as they all present plain error.

(2). Allow Appellant to present another appeal pursuant to Rule 35 of the Colorado Rules of Criminal Procedure pertaining to the issues that

all appellate remedies have not been exhausted while this Appeal is pending pertaining to all issues that all the appellate remedies have been exhausted.

(3). Remand the entire Appeal to the trial court in its present revised form. This will give the trial court an opportunity to make a proper decision on the Appeal as it now stands.

Another reason Appellant has encountered to warrant a necessity to allow another Appeal at this time is that he has read hints in some of the cases that he has read that a challenge to a prior conviction in a recidivist charge must be made prior to trial. Thus Appellant must raise these issues now as his trial for the recidivist charge is scheduled for June 30, 1982. Appellant also plans to request that these new issues be ruled on in the trial court prior to trial due to this fact but he in no way wishes to jeopardize this appeal by doing so and thus requests this court permission to do so.

WHEREFORE, Appellant requests that he be granted probable jurisdiction on the foregoing grounds.

DATED JUNE 16, 1982.

Respectfully Submitted,

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